United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-1118

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United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

JEROME MACKEY and WILLIAM NELSON,

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*; IN THE ALTERNATIVE, FOR A STAY OF THE ISSUANCE OF THE MANDATE UNTIL AFTER THE HEARING AND DETERMINATION OF THE APPLICATION FOR A WRIT OF CERTIORARI IN THE SUPREME COURT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- JEROME MACKEY and WILLIAM NELSON, Defendants-Appellants.	76-1118

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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Appellant Jerome Mackey seeks rehearing with a suggestion for rehearing en banc of the appeal to this court (Friendly, Feinberg and Van Graafeiland, C.J. from a judgment entered June 23, 1976 affirming a judgment of the United States District Court for the Eastern District (Weinstein, D.J.) which adjudged MACKEY guilty of having devised and executed a scheme to defraud through the mails, 18 U.S.C., Secs. 1341,2.

In the event rehearing be denied, Appellant requests that the issuance of the mandate and the surrender of the Appellant be stayed until after the hearing and determination of the application for a writ of certiorari in the Supreme Court.

The bases for this application (and of the application to the Supreme Court for a writ of certiorari in the event that rehearing in this court be denied) are set forth in the paragraphs which follow.

I

The indictment and conduct of the trial was derived from information which established the existence of a joint venture between Appellant MACKEY and two individuals by the names of NELSON and TAYLOR. That information was procured and presented to the indicting grand jury in contravention of the privilege between MACKEY and his former attorney.

II

In its affirmance of the judgment of conviction this court overlooked or misinterpreted portions of the record.

The only testimony relative to improper sales by the MDI salesmen was as consistent with breach of contract as with fraudulent misrepresentation. Moreover, it was uncontradicated that the Appellant MACKEY never gave any instructions to the salesmen and did no selling himself (394; 371). This court stated in its opinion that the Appellant MACKEY was "aware of the fraudulent promises being made." The record contains absolutely no basis for attributing such knowledge to the Appellant MACKEY.

The only testimony which bore upon Appellant's knowledge and conduct upon the employment of FISHER as a salesman was that Appellant had consented to FISHER'S employment upon TAYLOR'S assurance that he would control FISHER'S propensity for making misrepresentations (275). The opinion of this court stated that the Appellant MACKEY had consented to the employment of FISHER with knowledge of FISHER's "past dubious sales techniques." Thus, this court overlooked the fact that the APPELLANT MACKEY had consented to the employment of FISHER upon an assurance which purged MACKEY of guilt in giving his consent to the hiring.

It is uncontradicated on the record that Appellant MACKEY had consented to the delivery of duplicated tapes in place of major label "cut-outs" only under circumstances in which purchasers were to give their consents (279-80). This court referred to the fact of that substitution of duplicated tapes, but omitted any reference to the fact that MACKEY prohibited it unless made upon customers' consent. By overlooking the condition which had qualified MACKEY'S consent, the situation appeared to present a fraud, when in fact there was none.

An MDI employee testified that sometime in December the Appellant MACKEY had stated that the money in his account should be transferred to a separate account in order to defeat the claims of MDI creditors (795-96). Almost immediately after giving that testimony the employee acknowledged that she was not certain whether that statement had been made by the Appellant MACKEY or someone else (id.). Neverless, this court referred to that statement as having been made by the Apellant MACKEY. As further evidence that this court misconceived or overlooked the testimony in question is the fact that it referred to such a transfer

of assets as having then already been consummated, whereas, the testimony was only to the effect that such a transfer might be made subsequently (795).

III

This appeal presents a question of law to which no reference was made in the opinion of the court which accompanied the affirmance.

In Pelz v. United States (C.A., 2d Cir.), 54 F. (2d) 1001,1005, this court held that, in a prosecution under a similar statue, the proof must establish that the defendant "did something other than participate in the offense which is the object of the conspiracy. There must be proof of an unlawful agreement and participation therein with knowledge of the agreement."

Accordingly, even assuming arguendo that the evidence could support a finding of fraudulent sales and of the Appellant MACKEY'S knowledge of such frauds, the absence of any testimony that he had participated or acquiesced in such frauds with knowledge of a scheme must under the Pelz rule bar a conviction. With respect to the existence of a plan or scheme to defraud we have, both the absence of any affirmative testimony that there was, in fact, no underlying scheme to defraud. For the testimony of the Government witness himself was that, at the very moment of the devising of the venture between the three men, it had been agreed that the customers were to be told "just what they were getting into" (237).

IV

Appellant also requests the relief herein prayed for upon all the grounds stated in the brief on this appeal.

CONCLUSION

For the aforesaid reasons this petition for rehearing with a suggestion for rehearing en banc should be granted; or, in the alternative, the issuance of the mandate and surrender of the Appellant MACKEY should be stayed until after the hearing and determination of the application for a writ of certiorari to the Supreme Court.

Respectfully submitted,

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AFFIDAVIT OF PERSONAL SERVICE

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) SS:
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Frederick E. Weinberg being duly sworn, deposes and says, that I am over the age of 18 years. That on the 9th day of July ,1976 at No. 225 Cadman Plaza East, Bklyn., N.Y. in the City of New York , I served the foregoing Petition for Rehearing upon U.S. Attorney for East. Dist.of N.Y. in this action, by delivering to and leaving personally with said Attorney (2) ~~a~~ true ~~copy~~ copies) thereof.

Sworn to before me this 9th)
)----------
day of July 1976)

John Alusick

JOHN ALUSICK
Notary Public, State of New York
No. 31-4602133
Qualified in New York County
Commission Expires March 30, 1978

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